NGAN TUCK SENG & ANOR

v.

NGAN YIN GROUNDNUT FACTORY SDN BHD

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[COMPANIES WINDING UP NO: 28-48 OF 1998]
16 APRIL 1999

CIVIL PROCEDURE: *Jurisdiction - Superior court - Inherent jurisdiction - Whether to be distinguished from its statutory jurisdiction - Companies court - Striking out winding-up petition - Whether companies court has inherent jurisdiction to strike out winding up petition - Federal Constitution, art. 121 - Courts of Judicature Act 1964, s. 25(1) - Companies Act 1965, ss. 218, 221(1), (2)*

COMPANY LAW: *Directors - Partnership company - Removal of directors - Whether director can expect to hold office forever - Whether liable to be removed for just cause - Misconduct and conflict of interest - Whether constituted just cause for removal*

The Ngan Yin Groundnut Factory Sdn Bhd ('the respondent') was incorporated in October 1975 and had four directors. In 1996 and 1997, two of the directors, namely Tuck Seng and Tuck Hoi, were removed as directors of the respondent, allegedly on grounds of misconduct, conflict of interest and breach of trust. Following their removal, Tuck Seng and Tuck Hoi ('the petitioners') filed a petition for the winding up of the respondent, arguing that the respondent, being a partnership company, was in breach of the good faith and understanding shared between the partners as per the management and control of the respondent. According to the petitioners, with their removal as directors, the trust and confidence enjoyed between partners was gone, and it was therefore just and equiatable that the respondent be wound-up pursuant to s. 218 of the Companies Act 1965. The petitioners further argued that the two other directors, in their effort to maintain control over the respondent, had also made superfluous allotment of shares to two ladies, namely Lee Poh Peng and Ngan Mei Lang ('the two ladies'). The respondent and the other two directors had applied to have the petition struck out on the grounds that it was an abuse of process and was clearly unsustainable.

Held:

[1] On Malaysia Day, when by virtue of art. 121 of the Federal Constitution, the High Courts of Malaya and of Sabah and Sarawak came into existence, they came invested with that reserve fund of powers necessary to fulfill themselves as superior courts of Malaysia. They also enjoyed such powers as a separate and distinct source of jurisdiction from the statutory powers of the court. A companies court, accordingly, does exercise inherent jurisdiction.

[2] The respondent's failure to specifically state in its application that it was seeking to strike out on the ground that the petition was unsustainable was not fatal. The respondent had fully set out in its affidavits the facts upon which it sought to rely to sustain its submission that the petition was unsustainable, and that being so, the petitioners ought to have known the complaints against them and would also have the opportunity of replying to the allegations.

[3] The respondent was not seeking to try the petition in a summary way at an interlocutory stage. Be that as it may, as the presentation of a winding-up petition against a company would render the company virtually unable to carry on its business, the court would not allow it to remain a day longer if the petition can be shown to be manifestly unsustainable even at the interlocutory stage.

[4] In a partnership company, the expectation to hold office is not forever. A director, in other words, is liable to be removed upon a just cause. In the instant case, Tuck Seng, in acquiring Dansa Estate, had placed himself in a position where his duties and interest in the respondent might come into conflict with his interest as owner of Dansa Estate. By his conduct, he had also altered the relationship of mutual trust and confidence in the respondent, such that any expectation that he may have had of continuing to participate in the management and control of the respondent was justifiably defeated. As for Tuck Hoi, his preparedness to resort to violence to resolve matters within the respondent showed that his behaviour and conduct was such that his removal as a director was with just cause.

[5] There is no basis in the allegation that the allotment of the two shares to the two ladies was a device by the other two directors to maintain control of the respondent. Plainly, therefore, it was an abuse of process for the petitioners to have presented this winding-up petition.

[Application allowed; petition struck out.]

Case(s) referred to:

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627 ***(refd)***
Dato' Ibrahim Hj Ismail & Anor v. Onstream Marine Sdn Bhd & Ors [1998] 4 CLJ 526 ***(refd)***
Ebrahimi v. Westbourne Galleries Ltd & Ors [1973] AC 360 ***(refd)***
Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor [1996] 4 CLJ 828 ***(refd)***
MBF Holdings Bhd v. Huong Hai Kong [1993] 2 MLJ 516 ***(refd)***
Morgan v. 45 Flers Avenue Pty Ltd [1986] 10 ACLR 692 ***(refd)***
R Rama Chandran v. The Industrial Court of Malaysia [1997] 1 CLJ 147 ***(foll)***
Re Bambi Restaurants Ltd [1965] 2 All ER 79 ***(refd)***
Re Filedes Bros Ltd [1970] 1 All ER 923 ***(refd)***
Re Lo Siong Fong [1994] 2 MLJ 72 ***(refd)***
Re Ringtower Holdings Pte [1988] 5 BCC 82 ***(refd)***
Tien Ik Enterprise Sdn Bhd & Ors v. Woodsville Sdn Bhd [1995] 1 MLJ 769 ***(refd)***
Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Ors [1996] 1 CLJ 393 ***(refd)***
Yai Yen Hon & Ors v. Lim Mong Sam [1997] 2 MLJ 190 ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 131(5), 218(1)(i), 221(2)
Courts of Judicature Act 1964, s. 25(1)
Federal Constitution, arts. 121, 160, 162(1)
Rules of the High Court 1980, O. 14, O. 92 r. 4

Other source(s) referred to:

The Inherent Jurisdiction of the Court, Current Legal Problems, Sir Jack Jacobs, 1970, vol 23, p 23
Nature of Inherent Jurisdiction, IH Jacobs

For the petitioners - Chan Kok Keong (Lee Yen Lyn with him); M/s Chan & Assocs, David Chai; M/s David Chai & Partners
For the respondent - Low Siew Cheang (Vinod Kamalanathan & Yeoh Huei Keng with him); M/s Cheang & Ariff, M Karunananthan; M/s Maxwell Kenion Cowdy & Jones

Reported by WA Sharif

JUDGMENT

Clement Skinner JC:

This is an application made under the inherent jurisdiction of the court to have a winding-up petition presented against Ngan Yin Groundnut Factory Sdn Bhd (hereafter the respondent) struck out on the grounds that it constitutes an abuse of the process of court. The petition is presented persuant to s. 218(1)(i) Companies Act 1965 and was filed on 25 June 1998. The persons who seek the winding-up are Ngan Tuck Seng (Tuck Seng) and Ngan Tuck Hoi (Tuck Hoi) (the petitioners), two of the shareholders of the respondent who until 4 October 1996 and 9 January 1997 respectively were directors of the

respondent. They say it is just and equitable that the respondent should be wound-up for reasons that will be gone into shortly.

The petition is opposed not only by the respondent but also by Gan Tuck Meng (Tuck Meng) and Gan Tack Kong (Tack Kong) both of whom are shareholders and directors in the respondent, as well as by Ngan Yee San @ Ngan Mei Lang and Ngan Mei Wan @ Ngan Hau Yoong as trustee of the estate of Lee Poh Peng @ Lee Soon, both of whom are also shareholders in the respondent.

The Respondent And Shareholders

The respondent was incorporated on 14 October 1975 with an initial authorised capital of RM1,000,000 divided into 1,000,000 shares of RM1 each until 5 July 1976 when it was increased to RM2,000,000 by the creation of 1,000,000 ordinary shares of RM1 each. The three founding members of the respondent and the shares subscribed for by each on incorporation were:

Ngan Yin	...	1 share
Madam Lee Poh Peng @ Lee Soon	...	1 share
Madam Ngan Mei Lang	...	1 share

Madam Lee Poh Peng was the wife of Ngan Yin and Madam Ngan Mei Lang is a daughter of that marriage (I shall hereafter refer to these two persons as the two ladies). Ngan Yin also had a second wife, one Madam Wong Kwan Fong. Of the above persons, Ngan Yin and Madam Lee Poh Peng have passed away.

The late Ngan Yin had 4 sons from his union with his two wives. They are:

Tack Kong	(an opposer)
Tuck Meng	(an opposer)
Tuck Seng	(a petitioner)
Tuck Hoi	(a petitioner)

The principal objects for which the respondent was incorporated and its principal business till today is the manufacture of groundnuts.

Prior to the incorporation of the respondent, the late Ngan Yin was running a groundnut business in partnership with his sons Tack Kong, Tuck Meng and Tuck Seng, known as Ngan Yin Groundnut Factory (the partnership business). Within about six months of the incorporation of the respondent, an agreement (the takeover agreement) was on 27 April 1976 entered into between the respondent and the above mentioned persons whereby the respondent would

take over the assets and liabilities of the partnership business. In exchange, the respondent would allot 1,000,000 share of RM1 each in the respondent to the following:

Ngan Yin and Nominees	...	400,000 shares
Gan Tack Kong	...	200,000 shares
Gan Tuck Meng	...	200,000 shares
Ngan Tuck Seng	...	200,000 shares

Pursuant to the takeover agreement, the respondent issued 999,997 shares, so that the shareholding in the respondent as reflected in its relevant annual returns, stood as follows:

Ngan Yin	...	399,998
Gan Tack Kong	...	200,000
Gan Tuck Meng	...	200,000
Ngan Tuck Seng	...	200,000
Lee Poh Peng	...	1
Ngan Mei Lang	...	1

Out of his shareholding, the late Ngan Yin transferred 200,000 shares to Wong Kwan Fong who subsequently transferred these 200,000 shares to Tuck Hoi. The late Ngan Yin passed away on 19 July 1980 leaving a will in which he devised his residuary estate to his four sons in equal shares. The list of assets annexed to the grant of probate to the will of the late Ngan Yin shows the number of shares held by him in the respondent at the date of his death as 199,998 shares.

Increase In Paid Up Capital

After incorporation and until 4 January 1993 the issued and paid up capital of the respondent stood at RM1,000,000. On 4 January 1993, an extraordinary general meeting of the respondent was held. Two things happened at this meeting which was attended by all the shareholders:

(a) the paid-up capital was increased to RM1,000,002 by the allotment and issue of two shares (hereafter the two shares) to the Estate of Ngan Yin;

(b) permission was granted for the shares of the Estate of Ngan Yin, which had been increased from 199,998 to 200,000 by the issue of the two shares, to be immediately transferred to his four sons by equal amounts of 50,000 shares each as directed in his will.

As a consequence of the above transfers, the current shareholding in the respondent, as reflected in its annual returns of 4 October 1996 stands at:

Tuck Meng	...	250,000
Tack Kong	...	250,000
Tuck Seng	...	250,000
Tuck Hoi	...	250,000
Ngan Mei Wan for		
Lee Poh Seng (Deceased)	...	1
Ngan Mei Lang	...	1

The two shares issued to the estate of the late Ngan Yin is now the subject of complaint in this petition.

Directorship In Respondent

Prior to 4 October 1996, the respondent had four directors, namely Tuck Meng, Tack Kong, Tuck Seng and Tuck Hoi. Tuck Seng also enjoyed the position of managing director from which post he resigned on 8 February 1996. At the 20th annual general meeting of the respondent held on 4 October 1996, Tuck Seng was not re-elected as a director. At an extraordinary general meeting of the respondent held on 9 January 1997 Tuck Hoi was removed as a director. The removal of the petitioners as directors of the respondent is the main subject of complaint in this petition.

The Competing Contentions

In presenting this petition, Tuck Seng and Tuck Hoi maintain that the respondent, having taken over the partnership business, is in substance a partnership company. To remove them as directors is to act in breach of the good faith and understanding shared between partners that each should be allowed to participate in the management and control of the respondent. With their removal, the trust and confidence enjoyed between partners is gone and in these circumstances, it is just and equitable that the respondent should be wound-up.

Tuck Seng and Tuck Hoi also complain that the issue of the two shares to the Estate of Ngan Yin is superflous and void as no consideration was given by the allottee. It is a device to enable Tuck Meng and Tack Kong to maintain control over the respondent through the two shares held by the two ladies by maintaining them as shareholders and in these circumstances the exercise of rights attaching to these two shares has caused the petitioners to lose trust and confidence between partners and so it is just and equitable that the respondent should be wound-up.

The respondent and opposers on the other hand say the presentation of this petition is an abuse of process and must be struck out as it is clearly unsustainable. In so far as it hopes to establish the existence of a partnership company, it is bound to fail. Even assuming that the respondent is a partnership company, the removal of Tuck Seng and Tuck Hoi as directors was fully justified and so the petition is bound to fail on that score also. Similarly, the allegation that the issue of the two shares to the estate of the late Ngan Yin is void and a device to maintain control over the respondent is made without any basis and clearly unsustainable. Instead of letting this petition go through the whole process of being tried, the court should strike it out now.

Preliminary Issue

Before dealing with the merits of the application, I must address an issue raised in argument by Mr Chan Kok Keong learned counsel for the petitioners. In doing so, I should point out first that the parties to this petition have adopted the stand that the Rules of the High Court (RHC) have no application to a Companies Winding-up Petition presented under s. 218 Companies Act 1965 as such a petition is governed by the Companies (Winding-up) Rules 1972. That being the case, it is Mr Chan's submission that a companies court has no inherent jurisdiction to exercise because it has not been expressly conferred with any such jurisdiction by statute and in the absence of such conferment cannot strike out this petition on grounds of abuse of process.

Counsel puts his argument this way. The inherent jurisdiction of court did not survive Malaysia Day because after that day any jurisdiction or power exercised by the High Court must be expressly conferred by federal law. In support of this submission counsel refers to art. 121 of the Federal Constitution which in its material parts reads:

> Article 121
>
> (1) There shall be two High Courts of co-ordinate jurisdiction and status namely:
>
> (a) One in the States of Malaya ...
>
> (b) One in the States of Sabah and Sarawak ...
>
> and such inferior Courts as may be provided by federal law and the High Courts and inferior Courts shall have such jurisdiction and powers as may be conferred by or under federal law.

Therefore, submits counsel, the only powers that this court can exercise are those powers which are expressly conferred by federal law. Such federal law is to be found in the Courts of Judicature Act (1964) and in particular s. 25(1) thereof which reads:

> Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

It is learned counsel's submission that the word "and" found in s. 25 above quoted is to be read conjunctively with the result that all the powers a court exercises must be vested in it by written law. Therefore, says counsel, inherent jurisdiction, being part of common law and not written law, did not survive Malaysia Day. In amplification of his argument, counsel points out that the court still exercises inherent jurisdiction in those cases or actions which are governed by the Rules of the High Court (RHC) because O. 92 RHC expressly reserves that right to the court. However, as the RHC do not apply to a Companies Winding-up Petition and as neither the Companies Act 1965 or the Companies (Winding-up) Rules makes any reference to the inherent jurisdiction of a companies court, it is counsel's submission that a companies court enjoys no inherent powers.

Mr Chan then referred me to the decision in *Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor* [1996] 4 CLJ 828; [1997] 4 MLJ 198 in which the court there held, *inter alia,* that s. 221(2)(f) of the Companies Act 1965 gave the court the right to invoke an inherent jurisdiction to strike out a s. 218 petition. Counsel however urges me not to follow that part of the decision in the *Lyn Country* case that decides as stated above as it is his submission that the learned judge was wrong in finding that the words of sub-para. (f) of s. 221(2) of the Act gave him such jurisdiction when sub para. (f) does not do so. It is counsel's submission that sub para. (f) which gives the court power to "give such directions in the proceedings as the court thinks fit" on a petition being presented must be read in the context of sub-paras. (a) to (d) of the subsection which do not confer any inherent jurisdiction on the court and the word "such" appearing in sub para. (f) cannot and does not enlarge the powers of the court.

Alternatively, the word "direction" appearing in sub-para. (f) is to be read *ejusdem generis* the words appearing in sub-paras. (a) to (e) of s. 221(2) of the Act which clearly do not confer any inherent jurisdiction on the court.

Ms Yeoh Huel Keng learned counsel for the respondent who argues this particular issue submits that the inherent jurisdiction of the court must be distinguished from its statutory jurisdiction and when this is done, it will be seen that the source of the inherent jurisdiction of the court is derived not from statute but from its nature as a court of law. In support of her submission counsel referred to *Current Legal Problems* 1970, vol. 23, p. 23 and to the article by IH Jacobs on the *"Nature of Inherent Jurisdiction"*

In reply to the submission of counsel for the petitioners that the inherent jurisdiction did not survive Malaysia Day, Ms Yeow states that that argument ignores completely art. 162(1) of the Federal Constitution which must be read with art. 160. It is her submission that when the above articles are read together, it will be seen that the law applied before and after Malaysia Day is both statutory law and common law and inherent jurisdiction being unwritten law forms part of the common law which the courts are entitled to apply.

Having considered the submissions, I am not persuaded by the arguments advanced by counsel for the petitioners. To me, the views expressed by counsel for the respondent represent the correct position in Malaysia. I say so for reasons that follow.

The issue raised by counsel for the petitioner is best resolved by first looking at the definition of inherent jurisdiction, then identifying its source and then identifying the juridical basis of inherent jurisdiction. This has been authoratively undertaken in the Federal Court case of *R Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 MLJ 145 where Edgar Joseph Jr FCJ, cited with approval the article by Sir Jack Jacob, entitled *"The Inherent Jurisdiction of the Court"* 1970, in *Current Legal Problems,* vol. 23 where each of the above elements of inherent jurisdiction are identified and discussed.

In defining inherent jurisdiction the learned author says at p. 51:

> ... the inherent jurisdiction of the court may be defined as being that reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

In the same article the learned author identifies and distinguishes the source of statutory jurisdiction and inherent jurisdiction of the court as (at p. 24):

> The source of the statutory jurisdiction of the court is, of course, the statute itself, which will define the limits within which such jurisdiction is to be exercised, whereas the source of the inherent jurisdiction of the court is derived from its nature as court of law; so that the limits of such jurisdiction are not easy to define, and indeed appear to elude difinition.

The learned author then explained the juridical basis of inherent jurisdiction in these terms at p. 27:

> ... the jurisdiction to exercise these powers was derived, not from any statute or rule of law, and for this reason such jurisdiction has been called "inherent". This description has been criticised as being "metaphysical", but I think nevertheless that it is apt to describe the quality of this jurisdiction. For the

> essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such power is intrinsic in a superior court; it is very life blood, its very essence, its immanent attribute. Without such power, the court would have form but would lack substance. The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law.

Having cited approvingly the above passages, Edgar Joseph Jr FCJ then went on to express his views on the relationship between O. 92 r. 4 RHC and the inherent jurisdiction of court. This is what the learned judge said at p. 238:

> In my view, O. 92 r. 4 is a unique rule of court for while it neither defines nor gives jurisdiction, yet it serves as a reminder and confirmation - lest we forget - of the common law powers of the court, which are residuary or reserve powers and a separate and distinct source of jurisdiction from the statutory powers of the court.
>
> In other words, even without O. 92 r. 4, the inherent powers of the High Court would still be there ...

It is clear from the decision in *R Rama Chandran* that inherent jurisdiction, being part of the common law powers enjoyed and possessed by a High Court, of which a companies court is one, is a separate and distinct source of jurisdiction enjoyed by a court independent of any enabling statute or legislation. It follows therefore that on Malaysia Day, when by virtue of art. 121 of the Federal Constitution, the High Courts of Malaya and of Sabah and Sarawak came into existence, they came invested with that reserve fund of powers necessary to fulfill themselves as superior courts in Malaysia. And, as pointed out in *R Rama Chandran*, they enjoyed such powers as a separate and distinct source of jurisdiction from the statutory powers of the court. Accordingly, I have no hesitation in holding that a companies court does exercise inherent jurisdiction.

What I have stated above should dispose of the arguments raised by counsel for the petitioner but for completeness I would mention that were it necessary to consider whether the inherent jurisdiction survived Malaysia Day as part of the common law of England which continued to apply as part of our existing laws, that question was considered and answered in the affirmative by Annuar J (as he then was), albiet in the context of contempt proceedings, in the case of *MBF Holdings Bhd v. Huong Hai Kong* [1993] 2 MLJ 516. In view of my above finding, I do not consider it necessary to address the arguments raised on whether this court should follow the decision in *Lyn Country Sdn Bhd v. ELC Clothing Sdn Bhd (supra).*

I now turn to consider the merits of this application and will consider first the submission of learned counsel for the petitioners that this is not an appriopriate case to invoke the inherent jurisdiction to strike out because firstly, the respondent has failed to specify in its application why the petition is said to be an abuse of process and secondly, in arguing this application, the respondent has had to descend into the merits and deal with the facts which this court should refrain from doing on an interlocutory application since that would amount to trying this petition summarily. It is counsel's submission that the petition is not obviously unsustainable. This is not a plain and obvious case for striking out.

I find that whilst the respondent has not in its application specifically stated that it seeks to strike out on the ground that the petition is unsustainable, this omission is not fatal as the respondent has set out fully in its affidavits the facts upon which it relies to sustain its submission that the petition is unsustainable. The petitioners know what is complained of against them and have had every opportunity to reply to the allegations.

As regards the suggestion that the respondent is seeking to try this petition in a summary way at an interlocutory stage, I do not see that as what the respondent is doing here. Mr Loh Siew Chiang learned counsel for the respondent submits that it is a most serious matter to present a winding-up petition against a company. He has in colourful language described it as an attempt to put a fictional life to an end. And, the scheme of the Companies Act is such that immediately a petition is presented, the company is literally put into a 'coma'. In these circumstances if the petition can be shown to be manifestly unsustainable even at the interlocutory stage, the court should not allow it to remain a day longer but instead strike it out. I agree that that is a course open to the respondent and would here refer to the case of *Re Ringtower Holdings Pte* [1988] 5 BCC 82 at p 84 where Peter Gibson J said:

> Further, I have anxiously throughout borne in mind the cautionary words of Lord Templeman in *Williams & Humbert Ltd v. W & H Trade Marks (Jersey) LTD & Ors* [1986] 1 AER 19 at p. 139:
>
> > ... if an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleadings but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself.
>
> If the applicants can satisfy the court that the petitioners' claim are manifestly unsustainable or are an abuse of the process, justice requires that the petition (even one running to 29 pages, as this one does with the proposed amendments) be struck out forthwith.

Is The Respondent A Partnership Company?

Learned counsel for the respondent submits that it is not in every case where it is claimed that an incorporated entity is in substance a partnership company that the court will readily superimpose over the company the equitable principles enunciated in the case of *Ebrahimi v. Westbourne Galleries Ltd & Ors* [1973] AC 360. To attract the application of the *Ebrahimi* principles, the petitioners must be able to show "something more" than merely allege the existence of a partnership. This submits counsel, the petitioners have failed to do because the petition and affidavits in support of it are completely devoid of any facts or particulars detailing the historical circumstances and relationship between the parties that would assist the court to characterise the respondent as a partnership company.

Learned counsel also points out that if, as here, it is alleged that a pre-existing partnership was in existence, that partnership arrangement must be between and common to all the shareholders of the respondent and not just *inter-se* between particular parties. In support of the above proposition, counsel cites the case of *Dato' Ibrahim HJ Ismail & Anor v. Onstream Marine Sdn Bhd & Ors* [1998] 4 MLJ 65 and *Tuan HJ Ishak Bin Ismail v. Leong Hup Holdings Bhd & Ors* [1996] 1 MLJ 661. It is counsel's submission that the following facts in fact militate against a finding that the respondent is in substance a partnership company: Tuck Hoi was not even born when the takeover agreement was signed and Tuck Seng being born on 23 May 1961 was only 14 years old when he signed the takeover agreement.

Having set out the respondent's contentions, this would be a convenient place to make a brief reference to the *Ebrahimi* case. Lord Wilberforce in that case pointed that just because a company is small or a private one, that is not enough to subject the exercise of legal rights to equitable considerations within a company. Something more had to be shown. This is what Lord Wilberforce said at p. 380 of his speech:

> The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or contained on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited partnership; (ii) an agreement, or understanding, that all, or some (for there may be sleeping members), of the shareholders shall participate in the conduct of the business; (iii) restrictions upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

Now, whilst the respondent says the petitioners have been unable to show that "something more" to attract the application of equitable considerations in this case, and whilst I do entertain doubts about whether the respondent can be characterised as a partnership company for the reasons pointed out by Mr Loh, the fact remains that the takeover agreement does show that what was taken over was an existing partnership business carried on by the late Ngan Yin, Tack Kong, Tuck Meng and Tuck Seng. In addition to this, art. 26 of the articles of association of the respondent, contains preemptive rights in respect of transfers of shares, the effect of which, submits counsel for the petitioners, is to lock-in the petitioners in the company. I also do not think that it can seriously be disputed that the respondent is very much a family company and has been one from the very beginning up to this day.

In the light of these facts, and bearing in mind the decision of the Federal Court in the case of *Tien Ik Enterprise Sdn Bhd & Ors v. Woodsville Sdn Bhd* [1995] 1 MLJ 769, where it was held that it is not essential and therefore not a condition that before the *Ebrahimi* principles can be applied, the elements or at least one of the three elements mentioned by Lord Wilberforce must be present, I am not prepared to say at this stage of the proceedings that the petitioners' claim that the respondent is a partnership company is wholly unsustainable. I will therefore assume for the purposes of this application that the respondent is a partnership company.

The matter does not end there however, because even in a partnership company, the courts have recognised that the right or expectation to hold office is not forever. Such expectation may be defeated for good reasons. Thus, in *Re Lo Siong Fong* [1994] 2 MLJ 72, VC George J (as he then was) recognised that alterations in relationships within a partnership company can happen that could have the effect of putting an end to the equitable obligations that are allowed to override the rights and duties imposed by the memorandum and articles of a partnership company. The learned judge also made reference to the Australian case of *Morgan v. 45 Flers Avenue Pty Ltd* [1986] 10 ACLR 692 in which Young J recognised that even in a case where the three elements in *Ebrahimi's case* may exist so as to create equitable obligations within a company, those obligations are not for all time. This is what Young J said:

> However merely because these 3 elements may exist in a particular case does not mean that the court will draw the inference that there were superimposed equitable obligations on the company law rights and duties, nor will the court assume that just because that once was the case, that it is for all time because it is always competent for the parties to alter their relationship.

Similarly, in the case of *Yai Yen Hon & Ors v. Lim Mong Sam* [1997] 2 MLJ 190, Mokhtar Sidin JCA speaking for the Court of Appeal in a case involving a petition to wind-up a company under the just and equitable ground pursuant to s. 218(i) Companies Act observed that 'A director however, can be removed for just cause.'

The Petitioners' Expectation To Remain As Directors And Participate In Management

It is the submission of the respondent that the petitioners' expectations must be subject to good conduct on their part. A director is liable to be removed for just cause even in a partnership company. In this case there was such just cause. In the case of Tuck Seng, the respondent has brought forth the following evidence:

(a) the respondent owns an oil palm plantation in Sandakan, *Sabah (hereafter the Sabah Estate). Sometime in April 1995, Tuck Seng* whilst a director of the respondent acquired his own oil palm plantation in Sandakan, Sabah (hereafter Dansa Estate) situated about one hour drive from the respondent's Sabah Estate;

(b) in May 1996 during a due deligence exercise on Sabah Estate, it was discovered that Tuck Seng had misappropriated financial and labour resources of the respondent for his Dansa Estate. In support of these allegations, the respondent has exhibited bank statements and vouchers signed by Tuck Seng showing the monies taken personally by him. The respondent has also produced a statement from the manager of the Sabah Estate confirming that the financial and labour resources of Sabah Estate have been utilised on Dansa Estate on the directions of Tuck Seng.

The respondent says that on discovering the above, Tuck Seng was first suspended from duties and then not re-elected as director. The respondent says there was every justification to exclude Tuck Seng from management. He was in breach of his fiduciary duties to the company. He had put himself into a position of conflict of interest which he failed to disclose to the respondent. He was also in breach of that very trust and confidence which he claims exists between the members of the respondent and which underlies their whole relationship. Yet, submits counsel, Tuck Seng comes to court seeking equity with such unclean hands.

Tuck Seng denies these allegations. In his affidavit of 16 September 1998, he states that:

(a) Dansa Estate is not in competition with Sabah Estate. Dansa has not diminished the sale of oil palm fruits from Sabah Estate nor affected the price of fruits obtained by Sabah Estate and therefore there is no need for him to declare his interest in Dansa Estate;

(b) he is not in a position of conflict of interest. The articles of the respondent do not prohibit a director from holding office in another company and neither has he been interested in any contract with the respondent for which disclosure must be made in accordance with art. 78 of the respondent;

(c) as regards the use of the respondent's workers on Dansa Estate, Tuck Seng says these workers were utilised on their 'off' days or after their working hours at Sabah Estate and paid on a daily cash basis by him;

(d) he denies misappropriating the funds of the respondent and says any money taken was for the purposes of the respondent. Tuck Seng also says that he was authorised to operate the bank account of the respondent with Chong Ah Kau, the manager of Sabah Estate and therefore did not require prior approval from the board of the respondent before drawing money from the account;

(e) that a sum of money taken by him has been repaid to the respondent and Tack Kong and Tuck Meng are aware of this.

In view of the above denials by Tuck Seng, it is the submission of his counsel that a dispute has arisen whether or not Tuck Seng was removed for misconduct. This is an issue that is not suitable to be determined now but at a trial of this petition. This is not a plain and obvious case of misconduct. Similarly, whether *Tuck Seng* comes with unclean hands is a matter that can only be determined at the trial of this petition.

The approach a court should take in a situation such as this is clear. In *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 MLJ 400, Mohamad Azmi SCJ., speaking for the Federal Court said at p. 408:

> ... the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.

Notwithstanding that the above statement was made in the context of an application for summary judgment under O. 14 RHC, in my view they nevertheless apply in a situation such as here where a court is required to determine whether an assertion or denial once made raises a triable issue or not. Just because Tuck Seng denies the allegations made against him does not mean the court is precluded from looking at his denials with a critical eye and subjecting it to closer scrutiny and testing it in the manner suggested in the Bank Negara case to determine whether or not it raises issues worthy of a trial.

Having looked at each of his denials, this is what I find. In so far as the allegations of conflict of interest is concerned, the basic essential facts are not in dispute. *Tuck Seng* does not deny owning Dansa Estate. He does not deny that he has not made a disclosure of his interest in Dansa Estate. He does not deny that he has utilised the workers of Sabah Estate on his Dansa Estate. Section 131(5) of the Companies Act 1965 reads:

> Every director of a company who holds any office or possesses any property whereby whether directly or indirectly duties or interests **might** be created in conflict with his duties or interests as director shall declare at a meeting of the directors of the company the fact and the nature character and extent of the conflict (emphasis mine).

Keeping in mind the above provisions, it is my view that when Tuck Seng acquired Dansa Estate he had placed himself in a position where his duties and interest in the respondent might be in conflict with his interest as owner of Dansa Estate. The use of the workers of Sabah Estate on Dansa Estate provides a clear example of such conflict. Notwithstanding that Tuck Seng claims the workers worked at Dansa on their 'off' days and were paid in cash, the Sabah Estate manager Mr Chong Ah Kau states that he was instructed by Tuck Seng to conduct regular checks on Dansa Estate and supervise the running of day to day operations which also involved field supervisors of Sabah Estate working on Dansa Estate to supervise land clearing, drainage, weeding, slashing and spraying works. To me, it does not really matter whose version is correct because the very use of the workers on Dansa Estate would have given rise to the following question: Could it be said that is was in the best interest of Sabah Estate that its manager and supervisors be made to work on their 'off' days when they are supposed to be resting so as to be available to Sabah Estate in a refreshed state.

It is also no answer for Tuck Seng to say that as Dansa is not in competition with Sabah Estate, as the articles of the respondent do not prohibit him from being a director in any other company, and as he is not interested in any contract with the respondent for which he is obliged to make a disclosure under art. 78 of the respondent, there is no conflict of interest and therefore the duty to disclose under s. 131(5) does not arise. Such notion is clearly misconcieved because the duty to disclose is so strict that all that is required is that there **might** be conflict of interest before the duty to disclose under s. 131(5) arises. And, in this case Tuck Seng would have had no difficulty in realising that there might be a conflict of interest given the fact that both Sabah Estate and Dansa Estate are oil palm plantations where their needs, for example, in respect of financing, management, labour, equipment, fertilisers would to a great extent be similar.

In so far as Tuck Seng's denial of misappropriation of the respondent's finances for Dansa Estate is concerned, it should be noted that Tuck Seng does not deny withdrawing monies from the respondent's account. To me, the fact that Tuck Seng may be an authorised signatory to the account does not authorise improper use of the monies of the respondent for his own purposes. Neither would the fact that he has repaid money taken excuse the improper taking of the money. As far as his claim that the monies were withdrawn for the respondent's purposes is concerned, I find this to be a bare assertion unsupported by any other evidence and lacking in precision. Tuck Seng does not even attempt to explain what he did for the respondent with this money and why it was necessary to withdraw the money as cash. I also find the assertion inconsistent with contemporary documents in the form of the payment vouchers which all show the monies were paid to Tuck Seng as 'cash advance' and none of which show the money being withdrawn for the purposes of the respondent. On the other hand there is the statement made by Mr Chong Ah Kau the manager of Sabah Estate and co-signatory to the account, which shows the monies were withdrawn in cash on a monthly basis to pay Tuck Seng's estate workers.

It follows from what is stated above that I find Tuck Seng's denials and assertions equivocal, lacking in precision and inconsistent with contemporary documents. I have no difficulty rejecting them as raising any issues that needs to be determined at a trial. The question that arises from my findings is whether Tuck Seng, in the circumstances described above, can expect to remain as a director by invoking equitable considerations.

In my view, Tuck Seng's expectation to remain as a director and to participate in the management and control of the respondent must be circumscribed by a reciprocal expectation that he will himself in the discharge of his duties act in good faith and not do anything that would result in a breach of his fiduciary duties towards the respondent nor conduct himself in such a way that betrays that very trust and confidence which he claims binds members in a partnership company. This Tuck Seng had failed to do and in so doing had by his conduct so altered the underlying relationship of trust and mutual confidence in the respondent that he had well and truly put paid to any expectation that equitable obligations would continue to bind the parties. Thus, any expectation Tuck Seng may have had of continuing to participate in the management and control of the respondent were justifiably defeated when he was not re-elected as a director, and in my judgment, he cannot be heard to complain of the same. When viewed in that light, Tuck Seng's complaint of abuse of power and breach of good faith are plainly unsustainable.

In the case of Tuck Hoi, it is his claim that he was removed as a director because he tabled a resolution to have Tuck Seng reinstated as a director and to have Tack Kong removed as a director. Apart from this bare assertion, Tuck Hoi points to nothing else to support his contention. The respondent on the other hand says Tuck Hoi was removed because of his misconduct as a director of the company in that he had behaved violently to the extent of causing damage to property of the respondent. In support of its contention, the respondent has produced copies of minutes of board meetings between 21 November 1996 to 9 January 1997 at which the disbehaviour of Tuck Hoi is fully documented. It shows Tuck Hoi putting a brick to the lock of the office of the financial director to force open the same and thereafter forcing open a box containing personal documents of Madam Wong Kuan Fong. This took place on 12 November 1996. For this Tuck Hoi was suspended as director of Human Resources to be reinstated in two months if his behaviour improved. However, on 4 December 1996 Tuck Hoi again went to the office and instructed the carpenter to break open the lock of the office of financial director and when this was refused, left and came back with a policeman to witness his breaking open the office door. In the face of this the door was opened for him whereafter he ordered the lock to be changed and claimed the office, which was formerly occupied by his mother, as his office. As a result of the above incidents, at a meeting of the board on 9 November 1997, he was removed as a director.

Tuck Hoi has not denied any of the above allegations against him. In these circumstances, I find he must be taken as admitting them. I also find that the behaviour and conduct of Tuck Hoi to be such that his removal as director was with just cause. His preparedness to resort to violence to resolve matters within the respondent is certainly not conducive to evoking trust and confidence between partners and sufficient in my opinion to disentitle him from harbouring any expectation to remain as a director and participate in the management of the respondent.

Was The Issue Of The 2 Shares To The Estate Of Ngan Yin Void And A Device?

The petitioners begin by saying that the issue of the two shares is superfluous and void as no consideration has been given by the allottees. However, the respondent has produced countemporaneous documentary evidence in the form of the minutes of the EGM held on 4 January 1993 which shows all the shareholders in the respondent voted in favour of the allotment. The audited accounts of the respondent as at 31 January 1993 was also produced to show that the two shares have been paid for. It is clear from these documents that those attending the EGM did not think the issue of these two shares to be superfluous and the shares have been paid for. In the face of this evidence I find this assertion of the petitioners to be without any basis.

As regards the allegation that the allotment of the two shares was a device to maintain control of the company through the two ladies, this allegation must be looked at against the following relevant facts:

(a) the allotment was made as long ago as 1993 and there has been no suggestion that the proposal for the allotment came from Tuck Meng or Tack Kong. It has taken the petitioners some five years to complain that it is a device and no explanation is given why the complaint is made now only. In addition to the above, the petitioners have themselves benefited from the allotment of the two shares to the estate because the two shares were distributed to the beneficiaries of the estate including the petitioners;

(b) the allegation that the allotment is a device will only have some substance or credibility if the petitioners can establish as a fact that the two ladies are not the owners of their two shares in their own right. It is obvious from para. 13(a) of the petition that the petitioners claim they are the true owners of these two shares. In my judgment, it is not open to the petitioners to attempt to establish in a winding-up petition who the true owners of the two shares are. That is a question that must be determined in proceedings instituted in the ordinary way between the persons claiming those two shares as plaintiffs and the two ladies as registered owners of the shares as defendants. In *Re Bambi Restaurants Ltd* [1965] 2 All ER 79 a winding-up petition was presented against a company on the grounds that there was a deadlock in the company because the shares were evenly divided between the petitioner and her opposing husband, save for one share, held by the auditor, which the petitioner said was held on trust for her and her husband equally. Pennywick J in refusing to allow the ownership of the disputed share to be determined in a winding-up petition said:

> Counsel who appears for Mrs Joynes, has been unable to cite any authority for saying that on a contributory's winding-up petition the court can properly come to a determination as to the beneficial ownership of the shares which are registered in the name of an opposing contributory but to which the petitioner raises an adverse claim. That is an issue which, it seems to me, can be determined only in proceedings constituted in the ordinary way between the person claiming to have an interest in the share as plaintiff and the registered owner of the share as defendant ... That is to say Mrs. Joynes instead of ... ultimately seeking a declaration as to the ownership of the one share on the winding-up petition, will be compelled to start a new action, not in the Companies Court, and seek interlocutory relief and ultimately a declaration as to ownership in that action ...

(c) Tuck Seng also seeks to bolster his allegation that the position of the two ladies in the respondent must be as nominees because the late Ngan Yin never intended his daughters to participate in his Groundnut Factory business as he had left his daughters only pecuniary legacies in his will. My response to this allegation is firstly, that such an assertion is pure conjecture unsupported by any evidence and one that totally ignores the fact that one of the two ladies, namely Lee Poh Ping is the wife and not a daughter of Ngan Yin. Secondly as already stated above, it is not open to the petitioners to maintain in these proceedings that the two ladies are nominees without first establishing that fact in separate proceedings;

(d) the contemporary documents produced by the respondent show the position to be otherwise. The two ladies were subscribers of one share each in the incorporation of the respondent. Article 12 of the articles of association of the respondent does not recognise shares held on trust. Form 24, dated 28 October 1975, being a Return of Allotment of shares in the respondent shows the shares of the two ladies were paid for in cash. The Grant of Probate of the will of *Ngan Yin* contains no notation that the two shares held by the two ladies is held on trust for Ngan Yin. The same Grant of Probate shows the shares held by Ngan Yin as 119,998 only.

In the face of the evidence showing the two ladies as the owners of their two shares, the petitioners have been driven to submit that whilst the two ladies may legally exercise the rights attaching to those shares, it is the exercise of those rights that has caused the petitioners to lose their management role and in turn the trust and confidence shared between partners. In the circumstances equity will intervene by ordering a winding-up on the ground that it is just to do so. But, as I have already found, the petitioners are in no position to complain about their loss of office or confidence because such loss has resulted from the petitioners own misconduct and not the exercise of rights attaching to those two shares.

It follows from what I have said above that I find the allegation of a device to be completely without basis and for that reason plainly unsustainable.

There is a final matter relied upon by the petitioners as justifying this petition. They say that even before their removal as directors, the shareholders had at an Extra Ordinary General Meeting held on 2 May 1996 contemplated a winding-up of the respondent when it was proposed that a valuation of the assets of the respondent be undertaken to consider the possibility of winding-up. This indicates, according to the petitioners, that mutual confidence had already broken down by then. However, instead of pursuing winding-up, within about a month of the EGM, the vendetta against the petitioners began culminating with their removal as directors. The *bona fides* of their removal

is therefore questioned. In my view the petitioners are trying to make a case out of nothing here. As they have indicated, the EGM proposed a valuation to be undertaken to consider the possibility of a winding-up. That proposal may or may not have been carried through. It was an equivocal expression of intention. As opposed to that equivocal expression made some two years ago, the present position is that this petition has been opposed from the very beginning. In my view the court should look at the question of whether the members of the respondent desire a winding-up from the position as presents itself today and not yesterday. See: *Re Filedes Bros Ltd* [1970] 1 AER 923.

At the end of the day, having considered the matters raised, I am satisfied that it constitutes an abuse of process for the petitioners to have presented a winding-up petition on grounds that have been shown to be unsustainable. I accordingly allow this application and strike out the petition with costs.